No. 16-1177

IN THE SUPREME COURT OF THE UNITED STATES

COMMONWEALTH OF VIRGINIA
AND RANDAL MATHENA, CHIEF WARDEN,
RED ONION STATE PRISON,

Petitioners,

v.

DENNIS LEBLANC,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF IN OPPOSITION

BRYAN A. STEVENSON
Counsel of Record
RANDALL S. SUSSKIND
ALICIA A. D'ADDARIO
Equal Justice Initiative
122 Commerce Street
Montgomery, AL 36104
bstevenson@eji.org
(334) 269-1803

Counsel for Mr. LeBlanc

QUESTION PRESENTED
(Rephrased)

In 1994, the Virginia legislature abolished parole; a life sentence became life imprisonment without parole. A decade and a half later, this Court decided *Graham v. Florida*, 560 U.S. 48 (2010), holding that nonhomicide juvenile offenders must be afforded a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation" and may not be sentenced to life without the possibility of parole. *Id.* at 74, 75, 82. Following *Graham*, Dennis LeBlanc challenged his life-without-parole sentence for a nonhomicide offense when he was 16 years old, but the Virginia state courts determined he was not entitled to relief by relying on a rarely used provision designed to allow the release of elderly inmates who posed no threat to public safety because of their physical state. Below, the Fourth Circuit found that it was unreasonable for the Virginia courts to find that a geriatric provision of the Virginia code provides a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation. Thus, the question before this Court is:

> Was it an unreasonable application of this Court's decision in *Graham v. Florida*, 560 U.S. 48 (2010), for the Virginia state courts to uphold a life-without-parole sentence for a juvenile nonhomicide offender?

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

INTRODUCTION 1

STATEMENT OF THE CASE 3

REASONS TO DENY THE PETITION 9

I. Certiorari Should Be Denied Because Virginia Is a State that Imposes Life Without Parole on Juvenile Nonhomicide Offenders and the Fourth Circuit Properly Ruled that the Commonwealth's Geriatric Provision Does Not Satisfy the Requirements of *Graham*..... 9

II. Certiorari Should Be Denied Because the Petition Incorrectly Characterizes the State Court Decision and the Fourth Circuit's Opinion, Which Is Narrow and Limited in Application. 18

CONCLUSION 25

TABLE OF AUTHORITIES

CASES

Angel v. Commonwealth, 704 S.E.2d 386 (Va. 2011) . . . . . passim

Ark. Game and Fish Comm'n v. United States, 133 S. Ct. 511 (2012) 20

State v. Brown, 118 So. 3d 332 (La. 2013) 21

Brumfield v. Cain, 135 S. Ct. 2269 (2015) 13

Delta Air Lines, Inc. v. August, 450 U.S. 346 (1981) 20

Demirdjian v. Gipson, 832 F.3d 1060 (9th Cir. 2016) 21

Glover v. United States, 531 U.S. 198 (2001) 20

Graham v. Florida, 560 U.S. 48 (2010). . . . . passim

Harrington v. Richter, 562 U.S. 86 (2011) 23

LeBlanc v. Mathena, No. 2:12-cv-340, 2015 WL 4042175 (E.D. Va. July 1, 2015) 5, 10

LeBlanc v. Mathena, 841 F.3d 256 (4th Cir. 2016) . . . . . passim

Miller v. Alabama, 567 U.S. 460 (2012) 21

Miller-El v. Cockrell, 537 U.S. 322 (2003) 13

Roper v. Simmons, 543 U.S. 551 (2005) 4

State v. Smith, 295 Neb. 957 (Neb. 2017). 21

Solem v. Helm, 463 U.S. 277 (1983) 7

Starks v. Easterling, 659 F. App'x 277 (6th Cir. 2016) 21

Yee v. City of Escondido, 503 U.S. 519 (1992) 20

Youakim v. Miller, 425 U.S. 231 (1976) 20

STATUTES

28 U.S.C. § 2254(d) 13, 14, 16, 23

Colo. Rev. Stat. § 17-1-102 11

2000 Colo. Sess. Laws Ch. 312 11

Conn. Gen. Stat. § 54-131k 11

D.C. Code § 24-465 11

Fla. Admin. Code Ann. r. 23-24.020 12

Fla. Stat. § 940.01 12

Fla. Stat. § 947.149 12

Miss. Code Ann § 47-5-139 11

1995 Miss. Laws Ch. 596 11

Mo. Rev. Stat. § 217.250 11

1994 Mo. Laws S.B. 763 11

N.M. Stat. Ann. § 31-21-25.1 11

1997 Okla. Sess. Laws Ch. 133 11

Okla. Stat. tit. 57, § 332.7 11

1993 Ore. Laws Ch. 198 11

Ore. Rev. Stat. § 144.122(1)(c) 11

Tex. Gov't Code § 508.146 11

Va. Code Ann. § 53.1-40.01 ..... 4, 10, 11

Va. Code Ann. § 53.1-151 10

Va. Code Ann. § 53.1-165.1 3

RULES OF COURT

Sup. Ct. R. 10(a) 21

MISCELLANEOUS

Nat'l Inst. of Corr., U.S. Dep't. of Justice, Accession No. 024200, *Special Challenges Facing Parole* (Aug. 2011), *available at* https://s3.amazonaws.com/static.nicic.gov/Library/024200.pdf. . . . 10, 11

Va. Dep't of Corr., *State Responsible Offender Population Trends FY2010-FY2014* (July 2015), *available at* https://vadoc.virginia.gov/About/facts/research/new-statsum/offenderpopulationtrends_fy10-fy14.pdf 3

Va. Dep't of Corr., *Monthly Population Summary February 2017* (2017), *available at* https://vadoc.virginia.gov/About/facts/research/new-popsum/2017/feb17popsummary.pdf 24

INTRODUCTION

In 2003, Dennis LeBlanc was sentenced to life imprisonment without parole for a nonhomicide offense that occurred when he was 16 years old. This sentence violates this Court's holding in *Graham v. Florida*, 560 U.S. 48 (2010), which banned life-without-parole sentences and required that juvenile nonhomicide offenders must be provided a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Id.* at 75. Recognizing this violation, the Fourth Circuit Court of Appeals granted Mr. LeBlanc relief, remanding his case for resentencing "in accordance with *Graham* and the Eighth Amendment." *LeBlanc v. Mathena*, 841 F.3d 256, 274 (4th Cir. 2016). In *Graham*, this Court identified the Commonwealth of Virginia as one of the 11 states that sentenced children to life without the possibility of parole. 560 U.S. at 64, App.

The Commonwealth now claims that a statutory provision that preceded *Graham* by 15 years provides the opportunity required by *Graham*. The Fourth Circuit properly found, however, that the geriatric provision which, among other things, provides only the most remote opportunity for release akin to executive clemency, allows the Parole Board to deny release for any reason, and treats juvenile offenders worse than adult offenders, does not provide the opportunity *Graham* requires.

Specifically, the court below found the state court adjudication in this case to be an objectively unreasonable application of *Graham* because Mr. LeBlanc was a juvenile sentenced to life imprisonment without parole for a nonhomicide offense and because a general geriatric provision did not afford him with the "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation" demanded by *Graham* and did not account for juveniles' lesser culpability, in part by treating juvenile offenders *worse* than adults. *Id.* at 259–60, 267–68, 272.

This Court should deny certiorari and leave undisturbed the Fourth Circuit's holding decided squarely under the strictures of the Antiterrorism and Effective Death Penalty Act ("AEDPA"). There is no legitimate "split" that is damaging to Virginia's judicial system, as suggested by the Commonwealth. Instead, Virginia wishes for exemption from compliance with this Court's constitutional commands. Dennis LeBlanc's life-without-parole sentence violates *Graham*, and the Fourth Circuit rightly held that the state courts' finding that it did not was objectively unreasonable.

STATEMENT OF THE CASE

On July 15, 2002, Dennis LeBlanc was found guilty of nonhomicide offenses that occurred on July 6, 1999, when he was 16 years old. Mr. LeBlanc was convicted during a one-day bench trial after he waived his right to a jury on the advice of counsel. On March 4, 2003, he was sentenced to two terms of life imprisonment. Mr. LeBlanc did not appeal his conviction and sentence. Because Mr. LeBlanc's crime occurred in 1999, he is ineligible for any form of parole on his life sentences.[1]

On May 17, 2010, this Court held in *Graham v. Florida*, 560 U.S. 48, 82 (2010), that it is unconstitutional to condemn a juvenile to life imprisonment for a nonhomicide offense. The *Graham* Court reasoned that because children under the age of eighteen lack maturity, are vulnerable to negative outside influences,

---

[1]Virginia abolished parole for all people convicted of felonies after January 1, 1995. Va. Code Ann. § 53.1-165.1. Among those convicted before 1995, those sentenced to life imprisonment for the first time are eligible for parole after 15 years; those sentenced to two or more life sentences are eligible after 20 years. (4th-Cir.-JA 301.) After this first parole review, if parole is not granted, subsequent reviews occur annually; the board can extend this period, but to no longer than three years from the prior review. (4th-Cir.-JA 304.) Credit for good conduct may reduce the time an inmate must serve before becoming parole eligible. (4th-Cir.-JA-301.) As of June 2014, there were 4,656 people incarcerated in Virginia who were eligible for parole. Va. Dep't of Corr., *State Responsible Offender Population Trends FY2010-FY2014* 8 (July 2015), *available at* https://vadoc.virginia.gov/About/facts/research/new-statsum/offenderpopulationtrends_fy10-fy14.pdf.

and have characters that are not yet fully formed, they possess an inherently lessened culpability. *Id.* at 68 (citing *Roper v. Simmons*, 543 U.S. 551, 569–70 (2005)). Therefore, the *Graham* Court established a categorical bar on life-imprisonment-without-parole sentences for children who do not commit homicide. *Id.* at 74, 82. In doing so, the Court explicitly recognized Virginia as a state that permitted this type of unconstitutional punishment. *Id.* at 63–64.

In light of *Graham*, Mr. LeBlanc filed a Motion to Vacate Invalid Sentence on May 11, 2011, in the Virginia Beach Circuit Court. (4th-Cir.-JA 112.) The state court denied him relief, relying on a recent Supreme Court of Virginia decision, *Angel v. Commonwealth*, 704 S.E.2d 386 (Va. 2011), to conclude that a statute related to geriatric inmates relieves Virginia of any responsibility to comply with Graham. (4th-Cir.-JA 157.) The geriatric provision relied on by *Angel* was enacted over 15 years before *Graham* was decided and allows for the conditional release of prisoners who are over the age of 60 and have served at least 10 years of their sentence. Va. Code Ann. § 53.01-40.01. The Virginia Criminal Sentencing Commission has explained that the rationale for the geriatric provision was to save the Department of Corrections money through a non-parole procedure where inmates can still be released if they are infirm or terminally ill and pose no threat to public safety because of their physical weakness. (4th-Cir.-JA 193–94.)

On November 9, 2011, Mr. LeBlanc filed a petition for appeal in the Supreme Court of Virginia. The court heard arguments in support of a writ on April 3, 2012, and issued an order refusing Mr. LeBlanc's petition for appeal on April 13, 2012. Mr. LeBlanc filed a petition for rehearing at the Supreme Court of Virginia on April 26, 2012, and the court denied rehearing on June 15, 2012.

Mr. LeBlanc filed his first and only habeas petition on June 19, 2012. On July 1, 2015, the district court issued an opinion, concluding that under the standard of review set out by the Antiterrorism and Effective Death Penalty Act ("AEDPA"), Mr. LeBlanc is entitled to habeas relief. *LeBlanc v. Mathena*, No. 2:12-cv-340, 2015 WL 4042175, at *9 (E.D. Va. July 1, 2015). The district court held that Mr. LeBlanc must be resentenced in accordance with *Graham* and that he "may not be sentenced to life without the possibility of parole for nonhomicide offenses he committed as a juvenile." *Id.* at *19.

The Commonwealth appealed to the United States Court of Appeals for the Fourth Circuit. On May 10, 2016, the Fourth Circuit affirmed the district court's decision and again remanded Mr. LeBlanc's case for resentencing. *LeBlanc v. Mathena*, 841 F.3d 256, 274 (4th Cir. 2016). The court found the state court adjudication to be an objectively unreasonable application of *Graham* because Mr. LeBlanc was a juvenile sentenced to life imprisonment without parole for a nonhomicide offense. The court found that the geriatric provision did not afford

Mr. LeBlanc with the "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation," or account for juveniles' lesser culpability, as demanded by *Graham*. *Id.* at 259–60, 267–68. The court noted three "minimum requirements" a state's parole procedures must meet to comply with this Court's decision in *Graham*: "(1) that juvenile nonhomicide offenders sentenced to life imprisonment must have the 'opportunity to obtain release based on demonstrated maturity and rehabilitation,' (2) that this opportunity must be 'meaningful,' and (3) that the early release or parole system must take into account the lesser culpability of juvenile offenders." *Id.* at 267.

Regarding the first requirement, the court found the geriatric provision did not provide an opportunity to obtain release "based on demonstrated maturity and rehabilitation" because the geriatric provision procedures provide for an Initial Review stage at which the inmate must provide a "compelling reason" to receive review and the Board can deny review for *any reason*, thus providing no guarantee that maturity and rehabilitation will be considered. *Id.* at 270. The court found the geriatric provision further failed to comply with this requirement because it allows juveniles to die in prison "based solely on the heinousness or depravity of the offender's crime." *Id.* The court noted that in "*nearly every case*," Virginia has denied consideration under the geriatric provision based on the "serious nature of the crime," which directly contravenes *Graham*'s requirement

that a juvenile, because of the greater capacity for change than his adult counterparts, have the opportunity "to demonstrate that the bad acts he committed as a teenager are not representative of his true character." *Id.* at 270 (quoting *Graham*, 560 U.S. at 79).

The court found the geriatric provision also does not meet *Graham*'s second requirement, that the opportunity for release be "meaningful," for two reasons. First, in *Angel v. Commonwealth*, 704 S.E.2d 386 (2011), on which the state court entirely relied in denying Mr. LeBlanc relief, the Virginia Supreme Court expressed an *expectation* that a life sentence would mean a juvenile would spend the rest of his life in prison. *LeBlanc*, 841 F.3d at 270–71. Second, because the lack of any standards governing denial of geriatric petitions gives inmates only a "'bare possibility' of release," the mechanism does not constitute "'parole' for purposes of the Eighth Amendment." *Id.* at 271 (quoting *Solem v. Helm*, 463 U.S. 277, 301 (1983)). In so finding, the court cited to this Court's holding in *Graham* that executive clemency, with its similar lack of governing standards, does not constitute a "meaningful opportunity to obtain release." *Id.* at 271–72 (citing *Graham*, 560 U.S. at 69–70).

Finally, the court found that the geriatric provision does not meet *Graham*'s third requirement, that states take into account the lesser culpability of juvenile offenders. The court found that, even if Virginia authorities did not

exercise their prerogative to deny consideration under the geriatric provision at the Initial Review stage for any reason and went on to the Assessment Review stage, at which they would consider the "decision factors" used in a normal parole proceeding, "a prisoner's youth at the time of his offense is not among those factors." *Id.* at 272. Moreover, the court found that under the geriatric provision juvenile offenders are treated *worse* than adult offenders because they necessarily serve longer sentences, finding:

> Given that (1) the Supreme Court specifically held that sentencing systems that require juvenile offenders to serve more years and/or a greater percentage of their lives relative to adult offenders violate the Eighth Amendment's proportionality principle and that (2) Geriatric Release subjects juvenile offenders to longer—and proportionately longer—sentences, it was objectively unreasonable to conclude that Geriatric Release complied with *Graham*.

Id.

For these reasons, the Fourth Circuit held that the state court adjudication of Mr. LeBlanc's case was an objectively unreasonable application of *Graham* and ordered him to be resentenced in compliance with this Court's constitutional commands. *Id.* at 268, 274. The Commonwealth now petitions for certiorari.

REASONS TO DENY THE PETITION

I. Certiorari Should Be Denied Because Virginia Is a State that Imposes Life Without Parole on Juvenile Nonhomicide Offenders and the Fourth Circuit Properly Ruled that the Commonwealth's Geriatric Provision Does Not Satisfy the Requirements of *Graham*.

In *Graham v. Florida*, 560 U.S. 48 (2010), this Court held that it is a violation of the Eighth Amendment to sentence a child to life without parole for a nonhomicide offense committed before the child turned eighteen years old. *Id.* at 82. In *Graham*, the Court identified Virginia as one of the states where children are serving life-without-parole sentences for nonhomicide offenses. The Court stated, "there are 123 juvenile nonhomicide offenders serving life without parole sentences. A significant majority of those, 77 in total, are serving sentences imposed in Florida. The other 46 are imprisoned in just 10 States—California, Delaware, Iowa, Louisiana, Mississippi, Nebraska, Nevada, Oklahoma, South Carolina, and *Virginia*." *Id.* at 64 (emphasis added) (internal citations omitted); *see also id.* (citing Letter from Dr. Tama S. Celi, Virginia Department of Corrections, reporting that there were eight juvenile nonhomicide offenders serving life without parole in Virginia); *id.* at App. (listing Virginia in subsection entitled "Jurisdictions that Permit Life Without Parole Sentences for Juvenile Nonhomicide Offenders").

Virginia did nothing to bring its sentencing scheme into compliance with

Graham after the decision. Because Virginia's geriatric provision was enacted over 15 years before *Graham* was decided, it is not credible to suggest that the provision is a response to the decision or served to do so.[2] The Virginia Criminal Sentencing Commission has itself explained that the rationale for the geriatric provision was to save the Department of Corrections money through a non-parole procedure where inmates can still be released if they are infirm or terminally ill and pose no threat to public safety because of their physical weakness. (4th-Cir.-JA 193–94.) Virginia's geriatric provision is consistent with what a number of other states have done to address the costs associated with this growing population of elderly and infirm prisoners. This rising number of geriatric inmates created a corresponding increase in costs for departments of corrections, as expenses associated with incarcerating older prisoners are drastically higher. Nat'l Inst. of Corr., U.S. Dep't. of Justice, Accession No. 024200, *Special Challenges Facing Parole* 29–31 (Aug. 2011) [hereinafter "NIC"], *available at* https://s3.amazonaws.com/static.nicic.gov/Library/024200.pdf.

---

[2]That the Virginia legislature did not conceptualize the provision as parole is evinced by the fact that it does not appear in the section of the Virginia Code that pertains to parole. As the district court found, "[p]rovisions governing parole are found in a chapter entitled 'Probation and Parole' in Virginia's statutory provisions. Va. Code Ann. § 53.1-151. The geriatric provision is contained in the chapter regarding 'State Correctional Facilities,' and in a subsection regarding the 'privileges' of prisoners. *See* Va. Code Ann. § 53.1-40.01." *LeBlanc v. Mathena*, No. 2:12-cv-340, 2015 WL 4042175, at *16 (E.D. Va. July 1, 2015).

Therefore, in an attempt to address the increase in costs required to care for this growing population, Virginia, along with at least 13 other states and the District of Columbia, have enacted statutes that provide a mechanism for elderly prisoners to apply for release based on illness or age-based infirmities.[3]

These statutes are not meant to provide an evaluation of an inmate's rehabilitation and potential for successfully reentering and becoming a contributing member of society, as required by *Graham*. Instead of a mechanism to review the appropriateness of a prisoner's sentence, these statutes are intended to alleviate budgetary concerns of state departments of corrections by releasing prisoners who are costly to the system. NIC at 29–31; (4th-Cir.-JA 193–94.)

In *Graham*, this Court rejected the idea that these types of laws are

---

[3]Most of the states that have this type of provision either enacted the statute or amended their existing medical parole statute to include an age based provision in the 1990s and early 2000s, when the population of aging inmates began to grow rapidly. *See* Colo. Rev. Stat. § 17-1-102 (amended to included age-related provision in 2000); 2000 Colo. Sess. Laws Ch. 312; Conn. Gen. Stat. § 54-131k (enacted in 2004); D.C. Code § 24-465 (enacted in 1993); Miss. Code Ann. § 47-5-139 (amended to include age-related provision in 1995); 1995 Miss. Laws Ch. 596; Mo. Rev. Stat. § 217.250 (amended to include age-related provision in 1994); 1994 Mo. Laws S.B. 763; N.M. Stat. Ann. § 31-21-25.1 (enacted in 1994); Okla. Stat. tit. 57, § 332.7 (amended to include age-related provision in 1997); 1997 Okla. Sess. Laws Ch. 133; Ore. Rev. Stat. § 144.122(1)(c) (amended to include age-related provision in 1993); 1993 Ore. Laws Ch. 198; Tex. Gov't Code § 508.146 (enacted in 1997); Va. Code Ann. § 53.1-40.01 (enacted in 1994).

relevant to its conclusion that life-without-parole sentences for children convicted of nonhomicide offenses are unconstitutional. Under Florida's laws, Terrance Graham had a possibility of release both through the state's executive clemency procedures, Fla. Stat. § 940.01, and through Florida's conditional medical release program, which allows an inmate to be conditionally released due to an existing physical or medical condition, Fla. Stat. § 947.149; Fla. Admin. Code Ann. r. 23-24.020. Although Florida law provided for the remote possibility of medical release, the *Graham* Court ruled Florida was denying Mr. Graham "any chance to later demonstrate that he is fit to rejoin society based solely on a nonhomicide crime that he committed while he was a child," *Graham*, 560 U.S. at 79, and that states must provide "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Id.* at 75.

The Administrative Procedures governing the geriatric provision confirm that this provision is not parole. The Fourth Circuit noted "several key ways" in which it differs from Virginia's parole system. *LeBlanc*, 841 F.3d 256, 262 (4th Cir. 2016). In addition to the age restriction, an inmate must actively submit a petition which provides "compelling reasons" for consideration, whereas parole consideration is automatic; the Parole Board "may deny a petition for Geriatric Release at the Initial Review stage without considering any of the 'decision factors' enumerated in the Parole Board Policy Manual"; unlike those eligible for

parole, geriatric review applicants are not necessarily interviewed; and four members of the five-member Parole Board must vote to approve, as opposed to three for parole. *Id.* at 261–63.

In granting Mr. LeBlanc relief from his unconstitutional sentence, the Fourth Circuit properly recognized that it was unreasonable for the state courts to uphold Mr. LeBlanc's life-without-parole sentence by reasoning that the geriatric provision allows Virginia to meet the requirements of *Graham*. *Id.* at 268–72. Deference to a state court does not immunize the state court decision from habeas review. *Brumfield v. Cain*, 135 S. Ct. 2269, 2277 (2015) ("[D]eference does not imply abandonment or abdication of judicial review . . . ." (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003))). As the Fourth Circuit noted, federal habeas relief for a state prisoner is warranted under the AEDPA when his state court adjudication either "'was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States,' 28 U.S.C. § 2254(d)(1), or 'was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding,' *id.* § 2254(d)(2)." *LeBlanc*, 841 F.3d at 263. The Fourth Circuit properly found that the holding of *Graham* contained three minimum requirements: juvenile nonhomicide offenders must (1) have an opportunity to obtain release based on demonstrated maturity and

rehabilitation; (2) this opportunity must be meaningful; and (3) the parole system must account for the lesser culpability of juvenile offenders. *LeBlanc*, 841 F.3d at 264–67. It applied this clearly established federal law to the state court decisions below and held that the Virginia state courts' application of all three parts of this holding to Mr. LeBlanc's case was objectively unreasonable, warranting relief under 28 U.S.C. § 2254(d)(1).

We refrain from recounting here the Fourth Circuit's well-reasoned application of *Graham* to the state courts' decisions. It is necessary, however, to point out specific flaws in the Commonwealth's petition on these points. As a part of its holding that the geriatric provision fails to meet *Graham*'s first requirement—that of providing an "opportunity to obtain release based on demonstrated maturity and rehabilitation"—the Fourth Circuit noted that the Geriatric Release Administrative Procedures "allow the Parole Board to deny Geriatric Release for any reason at the Initial Review stage and therefore provide no guarantee that the Parole Board will consider a juvenile offender's maturation and rehabilitation—a question of federal constitutional law." *LeBlanc*, 841 F.3d at 270. Importantly, the state court decisions, the dissenting opinion at the Fourth Circuit, and the Commonwealth's petition fail to account for the procedures governing the Initial Review stage, nor do they explain why this process would be a suitable remedy under *Graham*.

Regarding the second requirement, that the opportunity be "meaningful," the court found in part that Mr. LeBlanc did not face the prospect of a "meaningful" opportunity when in *Angel v. Commonwealth*, 704 S.E.2d 386 (2011), on which the state court entirely relied in denying Mr. LeBlanc relief, the Virginia Supreme Court expressed an expectation that a life sentence would mean a juvenile would spend the rest of his life in prison. *Id.* at 270–71. In its petition to this Court, the Commonwealth does not directly challenge this assessment of *Angel*, which stated: "the effect of [the juvenile defendant's life] sentences is that [he] *will* spend the rest of his life confined in the penitentiary." 704 S.E.2d at 401 (as quoted by *LeBlanc*, 841 F.3d at 270–71). An *expectation* of death in prison cannot reasonably be read to comply with *Graham*'s requirement of a "meaningful opportunity to obtain release."

In its petition, the Commonwealth makes an unfounded assertion about *Graham*'s requirement of a "meaningful opportunity." The Commonwealth claims the Fourth Circuit "erred under AEDPA in concluding that a State's parole regulations are defective under *Graham* unless they make the consideration of 'maturity and rehabilitation' mandatory, rather than discretionary." Cert. Pet. at 24. It cites as error the Fourth Circuit's statement that "[f]or purposes of *Graham*, the key issue is not whether the Parole Board is '*able*' to consider a juvenile offender's rehabilitation and maturity—it is

whether the Parole Board *must* consider rehabilitation and maturation." *Id.* (quoting *LeBlanc*, 841 F.3d at 271 n.10 (first emphasis added by Commonwealth)). Yet this Court clearly stated in *Graham*: "What the State *must* do, however, is give defendants like Graham some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Graham* 560 U.S. at 75 (emphasis added). In light of the clarity of *Graham*, the Commonwealth's assertions that "*Graham* simply did not address the mandatory/discretionary distinction," and that "even if such consideration were discretionary, it would not be 'an unreasonable application of' *Graham* under § 2254(d)(1) for a State court to conclude that such a system provided the parole opportunity that *Graham* requires," Cert. Pet. at 25, constitute a fundamental misapprehension of *Graham*'s basic holdings that only reinforces the Fourth Circuit's holding that the Commonwealth's procedures do not provide the meaningful opportunity required.

Finally, the Fourth Circuit found that the geriatric provision does not meet *Graham*'s third requirement, that states take into account the lesser culpability of juvenile offenders. Most notably, the court found that under the geriatric provision juvenile offenders are treated *worse* than adult offenders because they necessarily serve longer sentences, holding that because "the Supreme Court specifically held that sentencing systems that require juvenile offenders to serve

more years and/or a greater percentage of their lives relative to adult offenders violate the Eighth Amendment's proportionality principle" and that Virginia's geriatric provision "subjects juvenile offenders to longer—and proportionately longer—sentences," it was objectively unreasonable for the state courts to conclude that the geriatric provision complied with Graham. *LeBlanc*, 841 F.3d at 272.

As discussed further in Part II, *infra*, the Fourth Circuit did not, as the Commonwealth claims, "conclud[e] that *Graham* 'clearly established' that parole eligibility at age 60 must be considered a life-without-parole sentence." Cert. Pet. at 30. The Commonwealth's claim here, in fact, serves to highlight a decisive difference between the geriatric provision and parole. Parole statutes premise eligibility on a number of years, or percentage of sentence, *served*. Thus a 16-year-old and a 40-year-old, each serving life with the possibility of parole after, for example, 20 years, will have a chance after that specified amount of time to demonstrate rehabilitation, the 16-year-old at age 36, and the 40-year-old at age 60. Under the Commonwealth's geriatric provision, however, the 16-year-old must serve 44 years to the 40-year-old's 20 years. This element of the geriatric provision directly violates *Graham*'s requirement that states account for juveniles' diminished culpability and treat them accordingly. It is objectively unreasonable to believe that a state could account for juveniles' diminished

culpability by giving them objectively *more severe* punishments than adults, and the Fourth Circuit held accordingly.

II. Certiorari Should Be Denied Because the Petition Incorrectly Characterizes the State Court Decision and the Fourth Circuit's Opinion, Which Is Narrow and Limited in Application.

The Fourth Circuit's opinion is narrow and implicates only a small cohort of Virginia's juvenile nonhomicide offenders. To obtain review by this Court, the Commonwealth exaggerates and mischaracterizes the lower court ruling and this Court should deny review.

First, the Commonwealth inaccurately alleges that the Fourth Circuit held parole eligibility at age 60 is equivalent to life without parole and that parole must be probable in order to satisfy *Graham v. Florida*, 560 U.S. 48 (2010). Cert. Pet. at i, 28 ("[T]he Fourth Circuit was wrong to read *Graham* to foreclose a parole system that postpones eligibility until age 60."); *id.* at 26 ("[T]he panel erred in reading *Graham* to require that States ensure a *probability* of release . . . ."); *see also id.* at 28–30, 34–39. To the contrary, the Fourth Circuit held that the state court decision permitting Mr. LeBlanc's life-without-parole sentence was an objectively unreasonable application of this Court's holding in *Graham*. *Leblanc*, 841 F.3d 256, 260 (4th Cir. 2016) ("[I]t was objectively unreasonable for the state courts to conclude that geriatric release affords [Mr. LeBlanc] with the 'meaningful opportunity to obtain release based on demonstrated maturity and

rehabilitation' *Graham* demands." (quoting *Graham*, 560 U.S. at 75)). Further, notwithstanding the fact Virginia abolished parole and that the geriatric provision is not parole, *LeBlanc*, 841 F.3d at 260, the Fourth Circuit explicitly stated: "It is important to note that this case does not present the question of whether a lengthy term-of-years sentence for a juvenile is the functional equivalent of life without parole under *Graham*." *Id.* at 267 n.5. The Fourth Circuit also explicitly declined to address any possible age-related limitations in *Graham*'s holding. *Id.* at 266 n.3 ("We take no position on whether *Graham* established—clearly or otherwise—other minimum requirements for parole or early release programs for juvenile nonhomicide offenders sentenced to life imprisonment.").

Similarly, in asserting that the Fourth Circuit held that parole must be probable, Cert. Pet. at 26–27, the Commonwealth presents a misreading of the Fourth Circuit's opinion. *LeBlanc*, 841 F.3d at 266. The Commonwealth neither quotes nor cites any portion of the Fourth Circuit opinion, including the dissent, to point to such a holding. The Commonwealth attempts to push its unsupported position by claiming the Fourth Circuit created some right to parole, again failing to cite to any portion of the Fourth Circuit's opinion. *See* Cert. Pet. at 28. The Fourth Circuit found that *Graham* drew a line in requiring an opportunity for release to be "more than a 'remote possibility,'" *LeBlanc*, 841 F.3d at 266

(quoting *Graham*, 560 U.S. at 70), and, confusingly, the Commonwealth does not otherwise appear to disagree, *see* Cert. Pet. at 26 ("'A State need not guarantee the offender eventual release, but if it imposes a sentence of life it must provide him or her with some realistic opportunity to obtain release before the end of that term.'" (quoting *Graham*, 560 U.S. at 82)).

As the Commonwealth presents a question not decided by the court below, this Court should deny review. *See Glover v. United States*, 531 U.S. 198, 205 (2001) ("In the ordinary course we do not decide questions neither raised nor resolved below."); *Youakim v. Miller*, 425 U.S. 231, 234 (1976) (per curiam) ("Ordinarily, this Court does not decide questions not raised or resolved in the lower court."); *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362 (1981) (finding question presented contained issue not decided in circuit court below so not properly before Supreme Court); *cf. Ark. Game and Fish Comm'n v. United States*, 133 S. Ct. 511, 521 (2012) (where at oral argument party "tendered a different justification for . . . judgment, one not aired in the courts below, and barely hinted at" in its brief, Court confined review to "issue explored and decided" below). Otherwise, this Court would be deciding an issue without benefit of a well developed record with relevant arguments on both sides. *See Yee v. City of Escondido*, 503 U.S. 519, 538 (1992) ("Prudence also dictates awaiting a case in which the issue was fully litigated below, so that [this Court] will have

the benefit of developed arguments on both sides and lower court opinions squarely addressing the question.").

Second, for there to be a circuit split, the Fourth Circuit must have issued a decision on a matter that runs counter to the holdings of other circuits. *See* Sup. Ct. R. 10(a) ("entered a decision in conflict"). The Commonwealth claims that the Fourth Circuit's opinion conflicts with the Sixth and Ninth Circuits as well as the high courts of Nebraska and Louisiana. Cert. Pet. at 34–36. However, every opinion the Commonwealth cites concerns whether a particular sentence is equivalent to life without parole; none concerns a single geriatric provision like Virginia's. *See, e.g.*, *Demirdjian v. Gipson*, 832 F.3d 1060, 1076 (9th Cir. 2016) (considering whether *Miller v. Alabama*, 567 U.S. 460 (2012), applied to two consecutive sentences of 25 years to life); *Starks v. Easterling*, 659 F. App'x 277, 278 (6th Cir. 2016) (unpublished) (considering whether *Miller* applied to sentence of life plus consecutive 11-year sentence with parole eligibility after 62 years); *State v. Smith*, 295 Neb. 957, 959, 971 (Neb. 2017) (considering sentence of 90 years to life with parole eligibility); *State v. Brown*, 118 So. 3d 332, 335 (La. 2013) (considering one life sentence, plus four 10-year sentences, with parole eligibility). The Fourth Circuit issued no holding on whether a term-of-years sentence is equivalent to life without parole, *LeBlanc*, 841 F.3d at 267 n.5, because Mr. LeBlanc is sentenced to life without parole.

Thus, the Fourth Circuit did not create a circuit split.

Third, the petition is due to be denied because the Commonwealth is incorrect in arguing that *Angel v. Commonwealth*, 704 S.E.2d 386 (2011), offered an interpretation of state law in upholding a life-without-parole sentence for a juvenile nonhomicide offender. *See, e.g.*, Cert. Pet. at 14 ("Virginia Supreme Court's interpretation"). The *Angel* Court merely quoted the statute, though not the procedures, then glossed over their plain text and structure in holding:

> The regulations for conditional release under this statute provide that *if the prisoner meets the qualifications for consideration contained in the statute*, the factors used in the normal parole consideration process apply to conditional release decisions under this statute. While this statute has an age qualifier, it provides, as the Commonwealth argues, the 'meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation' required by the Eighth Amendment.

Angel, 704 S.E.2d at 402 (emphasis added). The Fourth Circuit found that the plain language of the geriatric review procedures draws a clear distinction between the Initial Review stage, where a request for consideration can be denied for any reason, and the Assessment Review stage, the second stage where parole factors can be considered. *Leblanc v. Mathena*, 841 F.3d at 261, 269–70 ("[T]he Procedures allow the Parole Board to deny Geriatric Release for any reason at the Initial Review stage and therefore provide no guarantee that the Parole Board will consider a juvenile offender's maturation and rehabilitation—a

question of federal constitutional law."). As the Commonwealth admits, the *Angel* Court "drew no such distinction." Cert. Pet. at 14.

To the extent anything about the provision or regulation is unclear, the *Angel* Court offered no clarification or limiting construction, contrary to the Commonwealth's assertion.[4] Cert. Pet. at 19–21 (arguing "the Fourth Circuit's decision improperly intruded on the prerogative of the Supreme Court of Virginia to provide a limiting construction"). For example, the Court in *Angel* does not mention or clarify what constitutes a "compelling reason," required under the geriatric procedures to pass beyond the Initial Review stage. *LeBlanc*, 841 F.3d at 261. The Fourth Circuit was obligated under section 2254 to examine the state law decision in *Angel* and consider arguments on both sides because no reasoning was put forward by the *Angel* Court. *See Harrington v. Richter*, 562 U.S. 86, 102 (2011) ("Under § 2254(d), a habeas court must determine what arguments or theories supported or, as here, could have supported, the state court's decision . . . ."). Upon doing so, the Fourth Circuit found it was unreasonable to conclude Mr. LeBlanc, sentenced to life without parole, had a meaningful opportunity for release based on demonstrated maturity and

---

[4]The Fourth Circuit only mentions "unsettled" state law once, in order to demonstrate that the dissenting opinion's interpretation of *Angel* conflicts with the plain language of the procedures. *LeBlanc*, 841 F.3d at 269. Thus, the Commonwealth's repeated insistence that a question should have been certified to the Virginia Supreme Court, Cert. Pet. at 21–23, is inapposite.

rehabilitation. *LeBlanc*, 841 F.3d at 269.

Lastly, review should be denied because this case implicates the application of this Court's precedent to a single state statute and a related regulation, affecting only a narrow cohort of juvenile nonhomicide offenders in Virginia. In addition to incorrectly claiming this case involves the "validity of Virginia's parole regulations," Cert. Pet. at i, the Commonwealth attempts to provoke review with declarations of intolerable disruptions because 21 juvenile nonhomicide offenders, Cert. Pet. at 32, out of the nearly 30,000 people incarcerated in Virginia, Va. Dep't of Corr., *Monthly Population Summary February 2017* 1 (2017), *available at* https://vadoc.virginia.gov/About/facts/research/new-popsum/2017/feb17popsummary.pdf, may seek habeas review of their life-without-parole sentences.[5] For comparison, when *Graham* was decided, 16 years after the passage of Virginia's geriatric provision, there were at least eight juveniles in Virginia, and 77 in Florida, that the Court counted when determining how many juveniles fell under *Graham*'s purview. 560 U.S. at 63–64.

---

[5]The Commonwealth tries to pad the statistics by identifying people "serving aggregate sentences of 40 years or longer," Cert. Pet. at 32, who would be affected under its mistaken view of the Fourth Circuit's holdings. Because the Fourth Circuit explicitly did not decide whether a term of years was equivalent to life without parole, *LeBlanc*, 841 F.3d at 267 n.5, these individuals do not have sentences implicated by the Fourth Circuit's opinion.

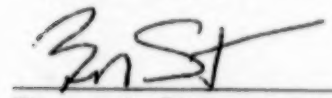
Thus, the Commonwealth vastly overstates and mischaracterizes this case, involving one statute and its applicability to 21 juvenile nonhomicide offenders in Virginia. The Fourth Circuit has not invalidated Virginia's parole regulations, has not ruled on the equivalence of a term of years to life without parole, and has not ruled that parole must be probable. Given the narrow holding and relevance of the Fourth Circuit's opinion, which the Commonwealth is unable to accurately contrast with the opinions of any other circuit court, and the opinion's limited impact, certiorari is not warranted and should be denied.

CONCLUSION

The Fourth Circuit properly found that the state court decision permitting a sentence of life without parole in Mr. LeBlanc's case was an unreasonable application of *Graham* because Mr. LeBlanc lacked a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation and Virginia's geriatric provision did not account for juveniles' lesser culpability. Additionally, review should be denied because the Commonwealth mischaracterized the lower court opinion, which concerns a single statute and single related regulation and which affects an exceedingly small cohort of Virginia inmates. Further, the Commonwealth seeks review of questions not litigated or decided in the court below, and seeks to create and embellish a circuit split predicated on a holding that was not reached in this case. Therefore, the Petition for Writ of Certiorari

should be denied.

Respectfully submitted,



BRYAN A. STEVENSON
Counsel of Record
RANDALL S. SUSSKIND
ALICIA A. D'ADDARIO
Equal Justice Initiative
122 Commerce Street
Montgomery, AL 36104
bstevenson@eji.org
(334) 269-1803

Counsel for Mr. LeBlanc